Council of Energy Resource Tribes
and the
National Congress of American Indians

September 1, 2006

[Email to IEED@bia.edu]
Attention: Section 1813 ROW Study
Office of Indian Energy and Economic Development
Room 20 – South Interior Building
1951 Constitution Avenue, N.W.
Washington, D.C. 20245

Dear Sir:

On behalf of the more than 300 member Indian tribes of the Council of Energy Resource Tribes ("CERT") and the National Congress of American Indians ("NCAI"), and pursuant to the notice published in the Federal Register Notice (71 Fed. Reg. 45575) on August 9, 2006, we submit for your review and careful consideration the following joint comments on the Draft Report ("Draft Report") mandated by section 1813 of the Energy Policy Act of 2005 ("EPAct", Pub.L.109-58).

While CERT and NCAI have believed from the outset that the study and report mandated by Congress in section 1813 of the EPAct is unwarranted given the ongoing willingness and ability of Indian tribes and their energy partners to reach agreement on rights-of-way ("ROW") and in light of federal Indian law and policy respecting tribal authority and consent when it comes to decisions regarding the disposition or use of tribal lands, we are mindful of the hard work and serious efforts put forth by the Departments of Energy and Interior ("Departments") in carrying out their charge and conducting the section 1813 study and report.

INTRODUCTION

Federal Indian law and policy in the area of tribal energy resource development and land management was most recently expressed in the August 2005 enactment of the Indian Tribal Energy Development and Self Determination Act of 2005 (Title V of Pub.L.109-58). Section 2602(a) of the Act requires the Secretary of the Interior to implement an Indian energy resource development program to assist Indian tribes in the development of their resources and to further the goal of Indian self-determination.

These same policy objectives were echoed just days ago in the proposed regulation issued by the Department of Interior on August 21, 2006, pursuant to 71 Federal Register 48625, designed to

implement the Tribal Energy Resource Agreement ("TERA") provisions of Title V. The proposed regulation provides that "[t]he implementation of these regulations will further the Federal Government's policy of providing enhanced self-determination and economic development opportunities for American Indian tribes and support the national energy policy of increasing utilization of domestic energy resources." Id. at 48626.

Those who in the spring of 2005 petitioned the Congress for condemnation authority over tribal lands to circumvent and undermine tribal authority and decision-making in the energy ROW field did not --- and could not --- have had these objectives in mind. Indeed, CERT and NCAI strongly believe that the impetus that gave rise to the section 1813 study and report is an anachronism that has been rightly discarded by the U.S. Government for decades.

For additional historical context, legal framework, and policy background, we refer you to the attached CERT letter dated May 15, 2006, containing the comments provided to the Departments in which CERT outlines the history of federal Indian policy as it relates to tribal land use, management and energy development. See attachment A.

PROFILE OF THE COUNCIL OF ENERGY RESOURCE TRIBES

After decades of passively witnessing outside interests dictate to tribal communities the terms and circumstances of energy resource development on tribal lands, CERT was founded in 1975 by Indian tribes to chart a new course for the prudent, tribally-driven development of tribal energy resources. In the 30 years since CERT was founded, far-sighted tribal leaders have dramatically restructured the federal-Indian relationship regarding mineral development on tribal lands and, at the same time, have forged close alliances and partnerships with private sector energy interests.

The member tribes of CERT have witnessed first-hand the fundamental truths of the Indian Tribal Self Determination policy: that vigorous tribal governments and robust tribal economies serve tribal members well, produce efficient allocations of resources, and in the end help improve the material standard of living of tribal members and local citizenry. Accordingly, CERT's tribal leadership has forged a dynamic three-pronged approach to achieve these goals: to assist Indian tribes effectively govern their own lands as well as play an important role in the governance of America; to master the tools of modern technology and business; and to cultivate diversified economies, integrating environmental and cultural values with economic growth.

PROFILE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians is the oldest and largest national tribal organization in the United States. NCAI is dedicated to protecting the sovereign rights of Indian tribes to govern their lands and their people, to promoting the trust responsibility and treaty obligations of the United States toward the Indian tribes, and to advancing the health and welfare of the Indian people. Protecting the sovereign right of Indian tribes to consent to any use or occupation of their lands is of fundamental importance to the 250 member tribes of NCAI.

SECTION 1813 DRAFT REPORT

The Departments of Energy and Interior ("Departments") issued the Draft Report ('Draft Report") on August 9, 2006, and have requested that written comments on the Draft Report be submitted not

2

later than September 1, 2006. This deadline was later extended to September 4, 2006, at 10:00 a.m. (EDT). On August 24, 25, 28 and 30, 2006, the Departments conducted open, public sessions as well as private, government-to-government consultation meetings with individual Indian tribes at four venues to solicit comments and input on the Draft Report. The Departments expressed an intention to deliver the Final Report to Congress not later than September 30, 2006.

As directed by Congress, the study and report are to have 4 elements: (1) an analysis of historic rates of compensation paid for energy rights-of-way ("ROW") on tribal land; (2) recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy ROW on tribal land; (3) an assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy ROW on tribal land; and (4) an analysis of relevant national energy transportation policies relating to grants, expansions, and renewal of energy ROW on tribal land.

SUMMARY OF JOINT COMMENTS

The following summarizes the major concerns that CERT and NCAI have with the Draft Report.

The Case Study Approach: The Draft Report relies on the case-study approach in addressing the issue of historic rates of compensation paid to Indian tribes for ROW on tribal land. CERT, NCAI and numerous Indian tribes have from the outset expressed concerns that the limited nature of four tribal case studies fails to accurately reflect the variety of ROW that have been successfully negotiated as well as the systemic undervaluation of ROW on tribal lands for energy transportation purposes.

Recommendations vs. Options: As passed by Congress, section 1813 requires the Departments to conduct a variety of factual and policy analyses related to ROW on tribal lands and, having conducted those analyses, to provide recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for purposes of ROW on tribal lands. Congress has not requested a slate of options that it could conceivably pursue regardless of the prevailing factual context. Rather, it has requested recommendations that are grounded in the factual findings and conclusions made by the Departments and therefore justified.

CERT and NCAI believe the Draft Report makes it abundantly clear that the two fundamental conclusions, namely (1) that tribal ROW compensation "does not appear to be consequential to the nation's consumers" (§4.3), and (2) that there is "no evidence to date that any of the difficulties associated with ROW negotiations have led to any adverse impacts on the reliability or security of energy supplies to consumers." (§4.3), must lead the Departments to make one obvious recommendation: that Congress should elect to make no changes to the current legal and policy regime which relies on open and uninterrupted negotiations and requires tribal consent as a fundamental aspect of those negotiations. In fact, if the Departments feel compelled to go beyond the "elect no change" recommendation, it would be entirely proper to eliminate any confusion and proceed to recommend to Congress that it affirm and strengthen the requirement of tribal consent through appropriate legislation.

CERT and NCAI are troubled that in lieu of the rational outcome described above, the Draft Report instead offers 5 "options" the Congress might wish to pursue should "it conclude that the issues associated with the existing legal framework and practices concerning energy ROW negotiations

3

are sufficiently important to require such actions." §4.4. 1 CERT and NCAI believe it is important for the Final Report to include a clear and unambiguous articulation of the factual findings made by the Departments and to tie those findings to recommendations consistent with those findings and conclusions.

The Voluntary Options for Consideration by Parties or the Departments: CERT and NCAI believe that the options suggested in terms of private, voluntary activities that might be pursued by the parties --- perhaps with the assistance of the Departments --- have merit and ought to be pursued. These activities include (1) undertaking a comprehensive inventory of energy ROW on tribal land including an historical analysis of the compensation paid for those ROW and whether any ROW were approved by the Department of Interior without compensating the tribe; and (2) the development of model or standard business practices for energy ROW transactions, including the identification of "best practices" guides which tribes and their would-be energy partners could use on a voluntary basis.

The Draft Report also includes discussion of an industry-tribal institute that in the opinion of the Departments could be a very useful resource for both tribes and companies. CERT and NCAI believe that further review of this option is needed to evaluate whether it is necessary to create a new institution for this function, and whether the proposal would have the support of tribal governments. It is important to keep in mind that these options are by no means exhaustive of those that might be identified by the tribes and the energy industry in the months ahead.

What follows are specific, section-by-section comments and suggestions that CERT and NCAI believe are necessary to ensure that the Final Report submitted to Congress accurately reflects the current factual situation with respect to the negotiation of energy ROW on tribal lands and recommendations that are suitable and justified given that situation.

Thank you for your careful consideration of our views and those of Indian tribes across the nation.

Sincerely,

Chris Devers Joe Garcia
Chairman, CERT President, NCAI
695 South Colorado Blvd, Suite 10 1301 Connecticut, NW, 2nd Floor
Denver, CO 80246 Washington, DC 20036

(303) 282-7576 (202) 466-7767
(303) 282-7584 fax (202) 466-7797

1 Prior to articulating these "options for consideration by Congress", the Departments stated that while "under existing law and regulations, difficulties arise in ROW negotiations from time to time that are sometimes very significant to the parties", nonetheless "it appears unlikely that these difficulties could lead to significant cost impacts for energy consumers or to significant threats to the physical delivery of energy supplies to market areas." §4.4.1.d, p. 27.

JOINT COMMENTS AND RECOMMENDATIONS ON THE

THE DRAFT SECTION 1813 STUDY AND REPORT

OF ENERGY RIGHTS OF WAY ON TRIBAL LANDS

SUBMITTED BY THE

COUNCIL OF ENERGY RESOURCE TRIBES AND

THE NATIONAL CONGRESS OF AMERICAN INDIANS

September 1, 2006

Section 1. Introduction. No comment

1.1 Statutory Language of Section 1813. No comment
1.2. Scope of Section 1813. Comment: CERT and NCAI have maintained from the outset that 4 case studies is not representative of the quantity or variation in ROW across tribal land for energy purposes. While the Draft Report acknowledges that "the data included in this report do not constitute a comprehensive review of rates paid for energy ROWs on tribal lands…and may tend to focus on the more complicated or contentious examples of energy ROW negotiations," there are materials submitted by Indian tribes and others that provide excellent information and perspectives and were simply not acknowledged or evidently given any weight. See: Testimony of Rosebud Sioux Tribe, Denver, CO, August 24, 2006.

- Tribal lands: The Draft Report includes discussion of energy ROW on tribal trust land only, not tribal fee land or individual allotted land. Comment: Some tribes are of the opinion that energy ROW significantly affect individual allottees on their land and therefore an analysis of ROW on allotted lands should also be included in the Final Report.
- Energy rights-of-way: Even though the term "energy rights of way" is susceptible of extremely broad interpretation, as some tribes have argued and the Departments acknowledged, the Draft Report focuses only on electric transmission lines, and natural gas and oil pipelines. Comment: Many CERT and NCAI member tribes believe that other types of energy ROW should have been included to give more depth and texture to the issue of ROW on tribal land for energy purposes.

1.3. Issues Raised in Scoping the Study. This section discusses the two public meetings and written comments submitted to the Departments. No comment
1.3.1. Tribal Sovereignty, Consent, and Self-Determination. This section discusses the underlying legal principles governing tribal authority and consent in granting access to tribal land, and notes the inability of tribes to raise funds for government services through taxation. The Draft
5

Report notes the tribes' concerns about prevention of harm to tribal natural and cultural resources and sacred sites and the role of tribal governments in these matters.

Comment: The tribal governments' role in protecting resources and sacred sites is much more important than the space given this issue in this section of the study. The protective function of tribal governments is often the major element of tribal decision-making when ROW issues are being considered. The Departments should be encouraged to expand this discussion in the Final Report.

1.3.2. Increasing Costs of Energy ROW. Energy industry commentators state that the mere exercise of tribal sovereignty and tribal consent, longer negotiation periods, and longer terms for ROW all serve to increase the costs of ROW to the companies and --- ultimately – to the consumers.
Comment: No time frames are provided in the Draft Report to support a comparative analysis of trends in demands for compensation by Indian tribes. It is also likely that in past decades when tribal governments were weak, the Department of Interior negotiated ROW compensation rates for tribes and may have, for a variety of reasons, systematically undervalued the compensation that ought to have been paid to the tribes. As Indian tribes have increasingly assumed greater levels of decision-making, management, control in energy-related endeavors (including ROW) it is probable that more accurate and fair – albeit higher --- compensation rates are being demanded by tribes and paid by the energy sector.

1.3.3. Decreasing Energy ROW Term of Years and Increasing Negotiation Periods. The Draft Report states that while in the vast majority of instances the parties negotiate and work in good faith to resolve differences they might have, there are times when negotiations are difficult and lengthy negotiations increase the costs associated with ROWs.
Comment: "Difficulties" arise in all or nearly commercial contexts, particularly those that require regular and sustained negotiations. The pressing question is whether these difficulties --- which are essentially private in nature --- pose a risk to either the affordability of products to American energy consumers or to reliability or security of the American energy transportation system. On these scores the Draft Report is clear and the answer is negative with regard to both inquiries.

1.3.4. Uncertainty in Energy ROW Negotiations. Industry commentators have argued that because there is "no uniform and measurable standard" for valuing ROW on tribal land, a high degree of "uncertainty" is created for the American energy infrastructure and consumer energy costs.
Comment: The Draft Report accurately portrays the tribal viewpoint that the imposition of any "standard valuation method" would, by definition, undermine the tribes' ability to exercise self-determination and to manage their energy resources as envisioned, for example most recently, in the Indian Tribal Energy Development and Self Determination Act of 2005, contained in the EPAct signed into law by President Bush on August 8, 2005.

1.3.5. Investments in Infrastructure. Some energy industry parties have suggested that shorter ROW terms of years, longer negotiation periods and the escalation of ROW rates amount to a "risk" to the industry that adversely affects the cost of the capital that is needed to build new infrastructure and discourages the expansion of, or investment in, existing energy facilities. The Draft Report notes that 18 western companies were studied over a period of five years but "only three companies
6

ever characterized the negotiation – or renegotiation – of tribal ROWs as a material issue in annual reports to the SEC." §1.3.5.

Tribal commentators retorted that, in fact, the number of energy ROW authorized on tribal lands is either increasing or is consistent with earlier levels of ROW granted by tribes for energy purposes and that successful ROW agreements have often led to expansion of energy production on tribal lands.

Comment: The Draft Report corroborates the tribal perspective that longer negotiation periods, increased compensation, and shorter terms (e.g. the "risk factors") do not seem to be as important as some in the energy sector claim or that whatever risks these factors pose are worth the added benefits that successful negotiation often brings to tribes.

1.3.7. Cost to Consumers. Some in the energy sector argue that increased costs of ROW on tribal land for energy purposes may lead to increases in the energy costs to customers. In fact, Edison Electric Institute commented that "energy ROW renewals resulted in tens of millions of dollars in additional costs to its member utilities and their customers." §1.3.7.
Countering this assertion, at least 3 tribes commissioned studies on the issue of impacts of ROW on tribal lands for energy purposes on consumer costs. The Southern Ute Indian Tribe reported that energy ROW charges on pipelines traversing tribal lands in the southwest or in the Four Corners area have had no discernible effect on market prices and that tribal energy ROW costs thus appear to have no impact on downstream markets at all. The second study, commissioned by the Navajo Nation, found the potential impact on consumers downstream could be .58 cents to .85 cents per year if the tribe's proposed ROW cost is passed directly on to the consumers. The third study, commissioned by the Ute Indian Tribe of the Uintah and Ouray Reservation, determined that the percentage of the consumer's bill attributable to tribal energy ROW costs is .01 cent to .06 cents per month for electricity and .01 cent to .16 cents for gas. The energy sector speculated that if the compensation rate increases for all 95 tribal ROW renewals in New Mexico were passed on to end users, customers could receive rate increases of 5 percent.

Comment: The Draft Report notes that one industry party alleged that "trespass penalties could add hundreds of thousands, or even millions, in additional costs to the utility and its customers but provided no specific data or actual instances of such a problem." (emphasis added). This amounts to an admission by the Departments that – unlike the tribal studies – some in the energy sector relied on a high degree of unsupported assertions and hypothetical situations to create the impression of a national problem that frankly is not borne out by the facts. CERT and NCAI urge that additional language to that effect should be included here to make it clear that uncorroborated or unsupported charges are not properly part of the factual record included in the Final Report.

1.3.8. Standards for Valuing energy ROWs on Tribal Land. Some in the energy sector argued that infrastructure reliability could be assured and consumer costs lessened by the imposition of an "objective, consistent, transparent, and uniform standard for valuing energy ROWs on tribal land." The suggested standards mirror those used in eminent domain proceedings. Indian tribes properly counter that the imposition of such a valuation method would constitute an exercise of eminent domain that is not appropriate for tribal lands. Tribal lands cannot be bought and sold in an open market and are thus not susceptible to any standard valuation method that applies to other lands. Further, such valuation techniques are regressive and similar to discredited federal Indian policies.

Comment: This is the core objective of those in the energy sector who advocated for condemnation authority and had to settle for the section 1813 study and report. The use of eminent domain (e.g. the "imposition of an imposed valuation method") would fundamentally alter not only the negotiating posture of the parties in favor of the non-tribal entities, but would severely restrict the inherent sovereign right of all Indian tribes to exclude persons from their territories. It would also, as noted above, conflict with the spirit and letter of federal Indian law and policy most recently expressed in the Indian Tribal Energy Development and Self Determination Act of 2005, signed into law by President Bush in August, 2005.

Section 2.
Negotiations for Energy ROWs on Tribal Land and the Implications for Tribal Self-Determination and Sovereignty

2.1. Statutory Background. This section discusses the history of federal statutes that have governed ROW on tribal land, beginning in 1880 and proceeding to the 1948 Indian Right-of-Way Act. The fundamental right of sovereign Indian tribes recognized in the statutes to grant or withhold consent to ROWs across tribal land is discussed.
Comment: While federal statutory and regulatory expressions over the years have not been entirely consistent, it is plain that since 1951, federal policy has been to require tribal consent in the approval of all ROW on tribal lands for energy purposes. While the 1951 regulation is the last expression on this matter and in fact serves to "harmonize" earlier expressions by the U.S. Government, one interesting issue raised in this section is whether Congress should make clear that the 1948 Act should be clarified to apply to all tribes, not just those organized under the Indian Reorganization Act of 1934, or the Oklahoma Indian Welfare Act.

2.2. Regulatory Background. This section discusses the federal regulations issued in 1951 and reveals that the current state of federal law is that there is no distinction between those tribes organized under the IRA or the OIWA and other tribes for purposes of requiring tribal consent in granting or renewing an energy ROW over tribal land. Indeed, the Draft Report calls the regulations "unambiguous" on this score.
2.3. Federal Policy of Tribal Self-Determination. The Draft Report discusses the policy of Indian self-determination that was recognized in the Indian Reorganization Act of 1934 and affirmed and expanded with the enactment of the Indian Self-Determination and Education Assistance Act in 1975. As a result, it is clear that tribal consent in the negotiation and approval of ROW on tribal land for energy purposes is fully consistent with, and indeed mandated by, the current policy of Indian Self-Determination.
2.4. The Issue of Consent and Implications for Tribal Sovereignty. Section 2.4 discusses tribal consent as an integral part of the exercise of tribal sovereignty over tribal land and resources and notes that (1) consent derives from inherent tribal sovereignty and (2) any reduction in the tribes' authority to grant or withhold its consent for a ROW would undermine that sovereignty and self-determination in significant ways.
Comment: CERT and NCAI would welcome a more explicit statement of the roots of tribal consent than is provided in this section. These roots are found in the inherent sovereignty of tribes that find expression in the U.S. Constitution, the opinions of Chief Justice John Marshall in the "Cherokee

Trilogy" of cases, and hundreds of treaties, federal statutes, and executive orders. The corollary is that Indian tribes have the right to exclude any and all persons. There is a significant line of cases throughout Federal Indian law jurisprudence dealing with trespass on Indian lands. The 2005 edition of Cohen's Handbook of Federal Indian Law at Chapter 4.01(2) enumerates "The Extent of Tribal [Inherent] Powers" as the powers to (a) determine form of tribal government, (b) determine membership, (c) legislate and tax, (d) administer justice, (e) exclude person from tribal territory and

(f) over non-Members. The exclusion power in (e) is fundamental and cannot be negated except by a very specific Act of Congress. Congress does not, and should not, lightly interfere with the inherent powers of tribal sovereign governments.

Section 3.
National Energy Transportation Policies Related to Grants, Expansions, and Renewals of Energy ROWs on Tribal Land

In this introduction to part four of the study, the Departments categorically find few national transportation policies that relate to energy ROWs on Indian land but note that what policies there are "strongly support tribal decision-making regarding energy ROWs on tribal lands."

3.1 National Energy Transportation Policies Directly Relevant to Energy ROWs on Tribal Land

3.1.1. Indian Right-of-Way Act of 1948 and Implementing Regulations. This section is a further discussion of the 1948 Act and the regulations promulgated under that Act that require the consent of all Indian tribes to all ROWs. Typically, tribes "negotiate route, compensation, term, and environmental, cultural and emergency protections." Stated succinctly, "the policy of Congress and DOI is to require tribal consent for all energy ROWs on tribal lands." (At p. 16.).

3.1.2. Historical Energy ROW Statutes and Regulations. This section discusses the history of the consent provision of the early statutes leading up to the 1948 Act. In discussing ROWs, the 1941 version of Felix Cohen's Handbook of Federal Indian Law says: "Generally these statutes do not make tribal consent a condition to the validity of the alienation, but as a practical administrative matter tribal consent is frequently made a condition of the grant." (At p. 17.)

3.2. General Policies Relating to Energy Matters on Tribal Land. In looking at general energy policies that may impact tribes, the study finds that with regard to tribal/private sector experience, there is "a continuing pattern of working cooperatively with tribal governments and with tribal consent." (At p. 17).

3.2.1. Emergency Authorities. The study "examined emergency authorities of the Secretary of Energy pursuant to the National Gas Policy Act [citation excluded] and the Federal Power Act [citation excluded]" and found that "in an emergency situation, these generally applicable statutes could apply to tribes." (At p. 17). So, "while no tribe has exercised its consent authority in a manner that created an emergency situation, the issues raised by Section 1813 force tribes into the untenable position of having to prove a negative, i.e., that no tribe will ever use its consent authority…[to] interfere with supplying energy resources in an emergency." In fact, the study finds that "the emergency authorities could provide a means of rectifying such a situation if it did occur." (At p. 17.).

9

Comment: CERT and NCAI would like more explication of these authorities, and suggest that the availability of legal authority --- in this case to the Secretary of Energy to ensure reliability in the delivery of energy supplies in cases of emergency --- serves to blunt the assertions that unless Congress takes action to rein in tribal authority and consent in ROW situations, national catastrophe will ensue.

3.2.2. Executive Branch Policies. This section discusses the Administration's National Energy Policy, developed in 2001, which does not include any discussion of problems in obtaining electric transmission ROW on tribal lands. As for natural gas and oil pipeline issues, the Policy does note problems "associated with pipeline capacity; obtaining ROWs" (from all governments), and "community resistance" to pipeline construction. (At p. 18.). There is no mention of tribal specific problems other than a recitation of statistics that American Indian households are underserved by utilities and a large percentage of such households lack electricity and gas service. The study notes Presidential proclamations on Indian policies and observes their focus on tribal sovereignty, self-determination and the enactment of Title V of the Energy Policy Act "to enhance energy opportunities and strengthen tribal economies." (At p. 19.).
Section 4. Issues for Stakeholder Consideration Concerning Standards and Procedures for Negotiation and Compensation for Energy ROWs on Tribal Land

4.1. Valuation Methods and Negotiations Regarding Energy ROWs on Tribal Land. Section 4.1 discusses various valuation methods tribes and companies currently use in ROW negotiations. More than 10 different methods are cited and tribes and companies are said to use one or more in combination. According to the Draft Report, "[t]his process is consistent with long-standing expressions of tribal sovereignty and self-determination in the federal-tribal relationship." (At p. 20.)
4.2. Summary of Comments. The Draft Report notes that "most industry parties contended that valuation of tribal lands for energy ROWs should be based on market value principles." Indian tribes, of course, are of the opinion that those principles are not appropriate for tribal land. However, some in the energy sector asserted that using market value "would restrict creative arrangements that promote development of energy resources on tribal lands." (At p. 20.)
The study summarizes market value principles and their application in the general real estate marketplace as well as in ROW negotiations. As for tribal land, some in the energy sector have "existing physical assets and investments on tribal lands" and believe that without such a standard, the cost for renewal of ROWs could escalate to the actual cost of building lines around tribal land , (at p. 22), and go on to cite this possibility as a disincentive for future investment in tribal lands.

Tribal lands are, in fact, their homelands and are not subject to sale as they are held in trust by the Federal government in accordance with treaties and other agreements. As such, they are fully protected against alienation. For many reasons, including the sad chapters in American history when tribal lands were taken from them, tribes jealously guard their inherent right "to determine access to and use of tribal lands and resources." (At p. 22.).

Studies prepared for different tribes show that ROW negotiated by municipalities are often based on methods other than market value principles, including franchise fees, taxes and other values. It is believed by tribes "and some energy companies" that "a single valuation method based on market

value of the land crossed by the energy ROW would reduce participation by tribes in energy partnerships and decrease energy production and transportation on tribal lands." (At p. 23.) Finally, tribes pointed out that all ROWs are finite agreements with defined terms and that the industry is "essentially complaining about a change in the business environment," and the evolving nature of the demands by rational actors in a volatile energy market. (At p. 23.)

4.3. Scope and Nature of the Issue. In section 4.3 the Draft Report identified the scope and nature of the issue of negotiating ROW from a public interest perspective and states that "[a]lthough the issue is significant for the parties, it does not appear to be consequential for the nation or consumers in general" because (1) the transportation costs in general are a small component of overall energy costs; (2) the amount of energy transported over tribal land is relatively small; (3) "there is no evidence to date that any of the difficulties associated with ROW negotiations [on tribal land] have led to any adverse impacts on the reliability or security of energy supplies to consumers;" and (4) most tribes need revenue and are seeking economic development opportunities, including "productive relationships with energy companies." (At p. 24).
The Draft Report notes that the inability of tribes and companies to agree on a valuation method is but a symptom of "more fundamental factors impeding their ability to reach agreement on terms for ROWs on tribal lands." These factors include a lack of shared objectives or the "common ground needed to explore potential solutions." These derive from the uneven amount of resources parties have to devote to the negotiation, difficulties in past dealings with each other, lack of shared goals about the value of the ROW, different cultural values, and past under-compensation. The Draft Report states that "[e]nergy companies that built productive relationships with tribes commented that they find tribes to be fair negotiators for energy ROW valuation on tribal lands." (At p. 25).

4.4. Options to Address the Issue. Comment: As passed by Congress, section 1813 requires the Departments to conduct a variety of factual and policy analyses related to ROW on tribal lands and, having conducted those analyses, to provide recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for purposes of ROW on tribal lands. Congress has not requested a slate of options that it could conceivably pursue regardless of the prevailing factual context. Rather, it has requested recommendations that are grounded in the factual findings and conclusions made by the Departments and therefore justified. CERT and NCAI believe the Draft Report makes it abundantly clear that the two fundamental conclusions, namely (1) that tribal ROW compensation "does not appear to be consequential to the nation's consumers" (§4.3), and (2) that there is "no evidence to date that any of the difficulties associated with ROW negotiations have led to any adverse impacts on the reliability or security of energy supplies to consumers." (§4.3), must lead the Departments to make one obvious recommendation: that Congress should elect to make no changes to the current legal and policy regime which relies on open and uninterrupted negotiations and requires tribal consent as a fundamental aspect of those negotiations. In fact, if the Departments feel compelled to go beyond the "elect no change" recommendation, it would be entirely proper and necessary to eliminate any confusion if it were to recommend that Congress affirm and strengthen the requirement of tribal consent through appropriate legislation.

CERT and NCAI are troubled that in lieu of the rational outcome described above, the Draft Report instead offers 5 "options" the Congress might wish to pursue should "it conclude that the issues associated with the existing legal framework and practices concerning energy ROW negotiations

are sufficiently important to require such actions." §4.4. 2 CERT and NCAI believe it is important for the final study to clearly articulate and emphasize their factual findings and to tie those findings to recommendations consistent with those findings and conclusions.

4.4.1. Options for Consideration by the Parties or the Departments. Comment: CERT and NCAI believe that the options suggested in terms of private, voluntary activities that might be pursued by the parties --- perhaps with the assistance of the Departments --- have merit and ought to be pursued. These activities include (1) undertaking a comprehensive inventory of energy ROW on tribal land including an historical analysis of the compensation paid for those ROW and whether any ROW were approved by the Department of Interior without compensating the tribe; (2) the development of model or standard business practices for energy ROW transactions, including the identification of "best practices" guides which tribes and their would-be energy partners could use on a voluntary basis; and (3) the development of a tribal – energy industry "institute" to facilitate ROW discussions and negotiations but that would include other aspects of energy development and productivity on tribal lands. These options are by no means exhaustive of those that might be identified by the tribes and the energy industry in the months ahead.
(a) Develop comprehensive ROW inventories for tribal lands. The Draft Report finds that an ROW data base would "facilitate better oversight, increase understanding of issues…and potentially streamline future negotiations."
Comment: CERT and NCAI support the creation of such a data base and believe that Indian tribes and tribal organizations can play a pivotal role in creating such a data base either through voluntary cooperation with the U.S. Government and / or through a contracted relationship pursuant to the Indian Self Determination and Education Assistance Act, as amended, 25 U.S.C. §450 et seq.

(b) Develop model or standard business practices for energy ROW transactions. The Draft Report states that the development of "best practices" could normalize and guide negotiations and would be helpful in the different ROW that are negotiated: new, renewal or expanded. The Draft Report also states that such guidance would be a useful tool for negotiators on both sides of the table.
Comment: CERT and NCAI agree that such a best practices guide or jointly-developed protocols could facilitate ROW negotiations and in the process lessen transaction costs and create better relationships between tribes and the energy sector.

(c) Broaden the scope of energy ROW negotiations. The Draft Report states that by focusing on other issues of importance to each party, if the scope of negotiations goes beyond valuation discussions, the benefits to both sides can be significant.
2 Prior to articulating these "options for consideration by Congress", the Departments stated that while "under existing law and regulations, difficulties arise in ROW negotiations from time to time that are sometimes very significant to the parties", nonetheless "it appears unlikely that these difficulties could lead to significant cost impacts for energy consumers or to significant threats to the physical delivery of energy supplies to market areas." §4.4.1.d, p. 27.

(d) Develop an industry-tribal ROW institute. The Draft Report concludes that an industry-tribal institute could be a very useful resource for both tribes and companies. Comment: CERT and NCAI believe that further review of this option is needed to evaluate whether it is necessary to create a new institution for this function, and whether the proposal would have the support of tribal governments.

4.4.2 Options for Consideration by Congress. The Draft Report avers that while it appears "unlikely" that negotiation difficulties "could lead to significant cost impacts for energy consumers" or to a significant threat to delivery of energy to market areas, the Departments opine that Congress might come to a different conclusion and suggest a range of options for Congress to consider. (At p. 27.) The "options" articulated in the Draft Report are as follows:
(a) Congress could elect no change, allowing ROW negotiations to continue under current laws, regulations, practices, and procedures.
(b) Congress could establish a legislative clarification of tribal consent.
(c) Congress could authorize the federal government to determine fair compensation.
(d) Congress could require binding valuation.
(e) Congress could specifically authorize condemnation of tribal lands for public necessity.
As passed by Congress, section 1813 requires the Departments to conduct a variety of factual and policy analyses related to ROW on tribal lands and, having conducted those analyses, to provide recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for purposes of ROW on tribal lands. Congress has not requested a slate of options that it could conceivably pursue regardless of the prevailing factual context. Rather, it has requested recommendations that are grounded in the factual findings and conclusions made by the Departments and therefore justified.

CERT and NCAI believe the Draft Report makes it abundantly clear that the two fundamental conclusions, namely (1) that tribal ROW compensation "does not appear to be consequential to the nation's consumers" (§4.3), and (2) that there is "no evidence to date that any of the difficulties associated with ROW negotiations have led to any adverse impacts on the reliability or security of energy supplies to consumers." (§4.3), must lead the Departments to make one obvious recommendation: that Congress should elect to make no changes to the current legal and policy regime which relies on open and uninterrupted negotiations and requires tribal consent as a fundamental aspect of those negotiations. In fact, if the Departments feel compelled to go beyond the "elect no change" recommendation, it would be entirely proper and necessary to eliminate any confusion if it were to recommend that Congress affirm and strengthen the requirement of tribal consent through appropriate legislation.

CERT and NCAI are troubled that in lieu of the rational outcome described above, the Draft Report instead offers 5 "options" the Congress might wish to pursue should "it conclude that the issues associated with the existing legal framework and practices concerning energy ROW negotiations are sufficiently important to require such actions." §4.4. 3

CERT and NCAI believe it is important for the final study to clearly articulate and emphasize their factual findings and to tie those findings to recommendations consistent with those findings and conclusions.

In addition, CERT and NCAI firmly believe that while there are 5 "options for consideration by Congress" provided in §4.4.2, there are any number of other potential actions Congress could take to encourage the private resolution of ROW negotiation difficulties. These include an active, vigorous role in securing mediation services to assist the parties as well as more formal, yet unobtrusive, ideas such as providing an insurance mechanism to encourage greater levels of property and infrastructure investment by energy and pipeline firms in Indian communities considered inappropriately risky.

For instance, a political risk program modeled on the Overseas Private Investment Corporation ("OPIC") could be created by Congress as one way to identify political and other risks to investment in Indian communities by providing political risk insurance program. Like OPIC, the insurance program would be administered as a U.S. Government agency, endowed with federal funds, yet whose insurance products are paid for by energy firms and others doing business in Indian country. In this way, the agency would not be subsidized by the U.S. taxpayers. This option would not require new legal authority if the Foreign Assistance Act were amended to include Indian tribes on the list of sovereigns eligible for OPIC participation.

Section 5. Analyses of Negotiations and Compensation Paid for Energy ROWs on Tribal Land. Comment: Section 5 is intended to respond to the study requirement for an analysis of historic rates of compensation for energy ROWs on tribal land. Using the case study method, the draft report used information provided by the Ute Indian Tribe of the Uintah and Ouray Reservation, the Morongo Band of Mission Indians, the Southern Ute Indian Tribe, and the Navajo Nation. The report cites the large number of ROW on tribal lands for energy purposes, the difficulties in comparing different types of ROW, and the confidentiality of energy ROW information as limiting factors. The data shows that renewals of ROW in these circumstances were generally for a shorter term of years and for higher compensation. However, these are questions about the verifiability of the information presented in 5.5.1. by the Edison Electric Institute and in

5.5.2. by the INGAA.
DC01/ 511829.3

3 Prior to articulating these "options for consideration by Congress", the Departments stated that while "under existing law and regulations, difficulties arise in ROW negotiations from time to time that are sometimes very significant to the parties", nonetheless "it appears unlikely that these difficulties could lead to significant cost impacts for energy consumers or to significant threats to the physical delivery of energy supplies to market areas." §4.4.1.d, p. 27.